Nos. 02-358 and 02-475

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 2002

GEORGE E. PATAKI, Governor of the State of New York, *et al.*,

Petitioners,

v.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., *et al.*,

Respondents.

RICHARD L. BRODSKY, New York State Assembly Member,

Petitioner,

v.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., *et al.*,

Respondents.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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38 pp

Counter-Statement of Questions Presented

1. Does the Bill of Attainder Clause apply to corporations, as every court that has considered the issue has held or assumed?

2. Did the courts below correctly find that the Indian Point Law (Chapter 190 of the New York Laws of 2000) imposed punishment, where (among other things) the deprivation mandated by the law was more than double the total amount of additional costs caused by the alleged imprudence, and the Senate sponsor of the law proclaimed that "[my] Law is going to stop them and punish them"?

3. Independently of the Bill of Attainder Clause, was the Indian Point Law also invalid as (a) a denial of equal protection, (b) a denial of procedural due process, (c) an attempt to regulate nuclear health and safety that was preempted by the Atomic Energy Act, and (d) a violation of the Contract Clause?

Statement Pursuant to Supreme Court Rule 29.6

Respondent Consolidated Edison Company of New York, Inc. is a wholly-owned subsidiary of Consolidated Edison, Inc., a publicly held company. There is no other publicly held company that owns 10% or more of respondent's stock.

TABLE OF CONTENTS

	PAGE
Counter-Statement of Questions Presented	i
Statement Pursuant to Supreme Court Rule 29.6	ii
Table of Authorities	v
Counter-Statement of the Case	2
A. The Rates Set by the New York State Public Service Commission ("PSC") Which Authorized Con Edison to Recover Replacement Power Costs Unless the PSC Found Imprudence After a Hearing	2
B. The Indian Point 2 Nuclear Plant and the February 2000 Outage	5
C. The PSC's Investigation of the Outage and Its Holding That There Was as Yet No Record Basis for a Finding of Imprudence	7
D. The Assembly's Condemnation of Con Edison and Its Passage of the Indian Point Law	8
E. The PSC's Warning That There Was No Factual Basis for the Indian Point Law and That It Was Probably Unconstitutional	10
F. The Senate's Passage of the Indian Point Law and the Senate Sponsor's Avowal of His Intent to Punish Con Edison	11
G. The Critical Differences Between the Indian Point Law and the Substantive and Procedural Standards of Imprudence Applied in All Other Cases	12

PAGE

REASONS FOR DENYING THE WRIT 13

I. This Case Presents No Issue Calling for Review by This Court 13

A. There Is No Conflict Among Courts Concerning the Applicability of the Bill of Attainder Clause to Corporations 13

B. The Court of Appeals Correctly Applied the Standards Articulated by This Court Under the Bill of Attainder Clause, and Petitioners' Argument to the Contrary Disregards the Facts Found Below 17

C. The Decision Below Will Not Result in the Ruinous Consequences Predicted by Petitioners, Because the Indian Point Law Is – for Good Reason – Literally Unique in the Annals of American Jurisprudence 20

II. The Issues Raised by Petitioners Are Not Determinative of This Case, Because the Indian Point Law Is Invalid for Additional Reasons Which Were Not Reached by the Court Below 22

A. Equal Protection 22

B. Procedural Due Process 24

C. Atomic Energy Act Preemption 25

D. Contract Clause 27

CONCLUSION 29

PAGE

TABLE OF AUTHORITIES

Cases

Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978) 15, 27, 28

BellSouth Corp. v. FCC, 162 F.3d 678 (D.C. Cir. 1998) 13, 20

BellSouth Corp. v. FCC, 144 F.3d 58 (D.C. Cir. 1998), *cert. denied*, 526 U.S. 1086 (1999) 14

Capital Tel. Co. v. New York Tel. Co., 750 F.2d 1154 (2d Cir. 1984), *cert. denied*, 471 U.S. 1101 (1985) ... 2

Carmell v. Texas, 529 U.S. 513 (2000) 15, 21

Chicago & Alton R.R. v. Tranbarger, 238 U.S. 67 (1915) 15

Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985) 24

Club Misty, Inc. v. Laski, 208 F.3d 615 (7th Cir.), *cert. denied*, 531 U.S. 1011 (2000) 13

Consolidated Edison Co., 34 N.Y.P.S.C. 663 (1994) . 4

Consolidated Edison Co., 22 N.Y.P.S.C. 98 (1982) .. 4

Consolidated Edison Co. v. Westinghouse Elec. Corp., 594 F. Supp. 698 (S.D.N.Y. 1984) 6

Consolidated Edison Co. v. Westinghouse Elec. Corp., 567 F. Supp. 358 (S.D.N.Y. 1983) 5

Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1866) . 15, 16

Duquesne Light Co. v. Barasch, 488 U.S. 299 (1989) .. 21

Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400 (1983) 15, 27, 28

English v. General Elec. Co., 496 U.S. 72 (1990) ... 25

PAGE

First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978) 14
Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810) 15

Gade v. National Solid Wastes Mgt. Ass'n, 505 U.S. 88 (1992) 26
General Motors Corp. v. Romein, 503 U.S. 181 (1992) 15, 27

Kentucky Union Co. v. Kentucky, 219 U.S. 140 (1911) 15

Long Island Lighting Co. v. Imo Indus. Inc., 6 F.3d 876 (2d Cir. 1993) 3
Long Island Lighting Co. v. PSC, 134 A.D.2d 135, 523 N.Y.S.2d 615 (3d Dep't 1987) 3
Lujan v. G & G Fire Sprinklers, Inc., 532 U.S. 189 (2001) 24

McFarland v. American Sugar Refining Co., 241 U.S. 79 (1916) 24

Navegar, Inc. v. United States, 192 F.3d 1050 (D.C. Cir. 1999), *cert. denied*, 531 U.S. 816 (2000) 13
Niagara Mohawk Power Corp., 31 N.Y.P.S.C. 1745 (1991) 4
Niagara Mohawk Power Corp., 24 N.Y.P.S.C. 6205 (1984) 4
Niagara Mohawk Power Corp. v. PSC, 69 N.Y.2d 365, 507 N.E.2d 287, 514 N.Y.S.2d 694 (1987) 2, 3
Nixon v. Administrator of General Services, 433 U.S. 425 (1977) 17-20

Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190 (1983) 25, 26

PAGE

Perez v. Campbell, 402 U.S. 637 (1971) 26
Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995) . 14, 21, 23

Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949) 24
Rowe v. Great Atlantic & Pacific Tea Co., 46 N.Y.2d 62, 385 N.E.2d 566, 412 N.Y.S.2d 827 (1978) ... 27
RR Village Ass'n, Inc. v. Denver Sewer Corp., 826 F.2d 1197 (2d Cir. 1987) 24

SBC Communications, Inc. v. FCC, 154 F.3d 226 (5th Cir. 1998), *cert. denied*, 525 U.S. 1113 (1999) 13-14
Selective Service System v. Minnesota Public Interest Research Group, 468 U.S. 841 (1984) 17, 18
South Carolina v. Katzenbach, 383 U.S. 301 (1966) . 14

Texas Eastern Transmission Corp. v. FPC, 306 F.2d 345 (5th Cir. 1962), *cert. denied*, 375 U.S. 941 (1963) 28
Trustees of Village of Saratoga Springs v. Saratoga Gas, Elec. Light & Power Co., 191 N.Y. 123, 83 N.E. 693 (1908) 2

United States v. Brown, 381 U.S. 437 (1965) 16
United States v. Florida East Coast Ry., 410 U.S. 224 (1973) 24-25
United States Trust Co. of New York v. New Jersey, 431 U.S. 1 (1977) 28

Village of Willowbrook v. Olech, 528 U.S. 562 (2000) 23

Washington v. Confederated Bands & Tribes of Yakima Indian Nation, 439 U.S. 463 (1979) 22
Waters-Pierce Oil Co. v. Texas, 212 U.S. 86 (1909) .. 15

PAGE

Constitutional Provisions, Statutes, and Rules

U.S. Const., Art. I, § 10 ..... 15, 16, 27
N.Y.C.P.L.R. Article 78 ..... 3, 13
N.Y. Public Service Law §§ 64-77 2
N.Y. Public Service Law § 66(12)(k) 3
N.Y. Public Service Law § 72 3
L. 1981, c. 304 3

Other Authorities

The Federalist No. 44 (C. Rossiter ed. 1961) (J. Madison) 15
The Federalist No. 84 (C. Rossiter ed. 1961) (A. Hamilton) 15
1 & 2 Geo. 4, c. 47 (1821) 16
22 Geo. 3, c. 31, § 1 (1781) 16
11 Geo. 3, c. 55, § 2 (1771) 16
Memorandum for the Governor From Attorney General Robert Abrams, June 23, 1981, in Governor's Bill Jacket for L. 1981, c. 304 3-4

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

Before the Court are two petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for

the Second Circuit, filed by Governor George E. Pataki, *et al.* ("Pataki Pet.") and New York State Assembly Member Richard L. Brodsky ("Brodsky Pet."). The petitions should be denied. Contrary to petitioners' arguments, the decision below is not in conflict with any decision of this or any other court. Rather, the court of appeals carefully applied the standards articulated by this Court under the Bill of Attainder Clause to the facts in the record, most of which are omitted from the petitions.

Counter-Statement of the Case

A. The Rates Set by the New York State Public Service Commission ("PSC") Which Authorized Con Edison to Recover Replacement Power Costs Unless the PSC Found Imprudence After a Hearing

The New York State Public Service Commission ("PSC") regulates intrastate electric utility service in New York pursuant to the New York State Public Service Law. *See* N.Y. Public Service Law §§ 64-77. The Public Service Law is a comprehensive regulatory scheme which "encompasses virtually all aspects of the [utility] business." *Capital Tel. Co. v. New York Tel. Co.*, 750 F.2d 1154, 1160 (2d Cir. 1984), *cert. denied*, 471 U.S. 1101 (1985). The New York courts have repeatedly emphasized the breadth of the Legislature's delegation of power to the PSC. *See, e.g., Niagara Mohawk Power Corp. v. PSC*, 69 N.Y.2d 365, 369, 507 N.E.2d 287, 289, 514 N.Y.S.2d 694, 696 (1987).[1]

In setting rates, the PSC has the power to disallow recovery

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[1] The enactment of the Public Service Law followed the New York State Legislature's recognition that it was impracticable for it to set rates individually for all of the various localities and types of utilities in the state. *See Trustees of Village of Saratoga Springs v. Saratoga Gas, Elec. Light & Power Co.*, 191 N.Y. 123, 143-44, 83 N.E. 693, 699 (1908).

of utility expenditures caused by imprudence, but this power is subject to both substantive and procedural safeguards. As a substantive matter, a finding of imprudence cannot be based on 20/20 hindsight, but can only be made if the utility acted unreasonably based on the circumstances as they existed at the time it acted. *Long Island Lighting Co. v. PSC*, 134 A.D.2d 135, 143-44, 523 N.Y.S.2d 615, 620 (3d Dep't 1987). Procedurally, it is necessary "to demonstrate a tenable basis for raising the specter of imprudence before the utility can be called upon to defend its conduct," *id.* at 144, 523 N.Y.S.2d at 620, and the utility has a right to an evidentiary hearing on the issue of imprudence, followed by a reasoned determination by the PSC which is subject to judicial review under Article 78 of New York's Civil Practice Law and Rules ("CPLR"). *See, e.g.*, N.Y. Public Service Law § 72. As the PSC acknowledged in this case (A1379),[2] the issue of imprudence is an adjudicatory issue, akin to the issue of fault in an ordinary civil case. *See, e.g., Long Island Lighting Co. v. Imo Indus. Inc.*, 6 F.3d 876, 885-86 (2d Cir. 1993).

Fuel adjustment clauses ("FACs") are used to adjust rates automatically for changes in the costs of fuel and purchased power and other expenses whose level is subject to fluctuation (A128-A129). The PSC has approved the use of FACs in utility tariffs since 1917. *Niagara Mohawk Power Corp. v. PSC, supra*, 69 N.Y.2d at 370, 507 N.E.2d at 290, 514 N.Y.S.2d at 697. A 1981 statute confirmed the PSC's power to review for imprudence the charges that had been passed on pursuant to FACs. L. 1981, c. 304, adding N.Y. Public Service Law § 66(12)(k). This statute recognized and "in no way change[d] the important safeguards of due process for the utilities already set forth in the Public Service Law." Memorandum for the Governor From Attorney General Robert Abrams, June 23, 1981, at 3, in

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[2] "A" citations are to the joint appendix in the court of appeals.

Governor's Bill Jacket for L. 1981, c. 304.

In a number of proceedings over the years, the PSC has considered the prudence of replacement power costs associated with nuclear plant outages. These proceedings have established several important principles. First, the standard of imprudence in cases dealing with nuclear plant outages is the same standard that applies in imprudence proceedings generally – reasonableness under the circumstances as they existed at the time the utility acted. *See, e.g., Niagara Mohawk Power Corp.*, 24 N.Y.P.S.C. 6205, 6211 & n.1, 6226 (1984); *Consolidated Edison Co.*, 22 N.Y.P.S.C. 98, 105-08 (1982). Second, even where imprudence is found, no disallowance will be made for those portions of outages that would have been necessary in any event for maintenance, refueling, or installation of new equipment. *See, e.g., Niagara Mohawk Power Corp.*, 31 N.Y.P.S.C. 1745, 1765-68 (1991); *Consolidated Edison Co.*, 34 N.Y.P.S.C. 663, 678 (1994). Finally, the PSC's consideration of this issue has included all of the procedural safeguards which apply in imprudence proceedings generally. *See, e.g., Niagara Mohawk Power Corp., supra*, 24 N.Y.P.S.C. at 6209.

During the relevant period, the electric rates of respondent Consolidated Edison Company of New York, Inc. ("Con Edison") were fixed by an agreement entered into by Con Edison, the PSC staff, the New York State Department of Law, and many other parties (A427-A546), which was approved by the PSC in 1997 (A417-A425, A553-A669). This agreement provided for rate reductions of more than $1.1 billion (A441-A443), as well as the divestiture of Con Edison's fossil fuel generating plants (A477-A479). As part of the overall agreement between the parties, the agreement provided that Con Edison would recover through the FAC the cost of purchasing energy in the volatile and now unregulated wholesale market (A158-A166, A467-A468, A1359). The FAC expressly provided that cost increases or savings relating to the operation of

Con Edison's Indian Point 2 nuclear plant would be charged or credited to customers through the FAC, except that Con Edison would retain or bear 30% of such cost changes up to a maximum of $10 million per year (A130-A131, A163).[3]

B. The Indian Point 2 Nuclear Plant and the February 2000 Outage

Beginning in 1974, Con Edison operated the Indian Point 2 nuclear power plant ("Indian Point 2") in Westchester County, New York (A30). Indian Point 2 is a pressurized water reactor plant, in which hot, pressurized, radioactive primary water from the nuclear reactor vessel is pumped through tubes in four steam generators, where it is used to vaporize nonradioactive secondary water into steam which is used to generate electricity (A40-A41, A267-A268).

Westinghouse manufactured two models of steam generators (Models 44 and 51) that had tubes made of the same metal alloy, Inconel 600 (A41, A726-A727). Westinghouse delivered these models to approximately 30 nuclear plants in the United States (A42). In the 1970s, it was discovered that Inconel 600 was susceptible to corrosion in certain environments (A41, A727). As a result, Con Edison and many other utilities sued Westinghouse. *See, e.g., Consolidated Edison Co. v. Westinghouse Elec. Corp.*, 567 F. Supp. 358, 360 (S.D.N.Y. 1983).

Because petitioner Brodsky wrongly claims that it is "undisputed" that Con Edison was negligent in not replacing the steam generators sooner than it did (Brodsky Pet. 27), it is important to note that Con Edison carefully considered whether this would be in the best interests of its customers. Premature installation would have cost customers over $100 million in

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[3] The Brodsky petition asserts that Con Edison was the only New York utility with a fuel adjustment clause covering nuclear plant outages (Brodsky Pet. 3), but this is inaccurate (A673, A1359).

construction costs, plus the cost of purchasing replacement power during the installation (A43). Con Edison, like many other nuclear plant operators, was successful in combating corrosion in the steam generators by making changes in water chemistry and other aspects of plant operation (A42).[4] Indeed, Con Edison's success in stopping the corrosion was used against it by Westinghouse in defending against Con Edison's warranty claim. *See Consolidated Edison Co. v. Westinghouse Elec. Corp.*, 594 F. Supp. 698, 699 (S.D.N.Y. 1984) ("[t]he corrosion of the steam generators at Indian Point Unit 2 is essentially arrested" and "if the current condition of the steam generator continues, the steam generator should serve the life of the plant").

Con Edison's operation of the Indian Point 2 plant, including its steam generators, was subject to extensive regulation by the Nuclear Regulatory Commission ("NRC") (*see* A46-A54). As required by the NRC, the steam generator tubes were inspected by highly trained specialists every two years, and the inspections were reported in detail to the NRC (*see* A43-A44, A1229-A1282).

On February 15, 2000, one of the 13,000 steam generator tubes at Indian Point 2 experienced a two-inch crack, allowing a small quantity of radioactive primary water to leak through the tube wall (A40, A44, A56). The leak was immediately detected, and the plant was manually shut down by the operators (A44, A56-A58). It is undisputed that the incident did not affect the health or safety of any member of the public (A59-

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[4] As of January 1997, approximately 16 of the 30 plants built with Westinghouse Model 44 and 51 steam generators in the United States were still using their original steam generators (A42). Petitioners' statement that Con Edison was the only utility that did not replace the Model 44 steam generators (Pataki Pet. 3; Brodsky Pet. 2) is misleading because it ignores the 15 plants still using Model 51 steam generators, which used the identical Inconel 600 alloy (*see* A1359).

A61, A72). Indeed, the releases represented a small fraction of the normal amount of background radiation (A59-A60).

Shortly after the incident, Con Edison found the leak and plugged the affected tube (A44). During the period from February through June 2000 (a substantial portion of which coincided with a pre-planned refueling and maintenance outage), Con Edison inspected all of the steam generator tubes at Indian Point 2, and reported its findings to the NRC (A44-A45, A1360, A1375). In August 2000, Con Edison decided to install new steam generators before restarting the plant (A37). Following installation of the new steam generators, the plant resumed operations in January 2001.

Because the cost of generating electricity at the Indian Point 2 plant was substantially less than the price of replacement power,[5] the unavailability of the plant during the outage resulted in increased energy costs of about $250 million. It is undisputed in the record that more than half of this amount was attributable to the time required for refueling, maintenance, and installation of the new steam generators, all of which would have been required even if the new steam generators had been installed earlier, as the petitioners argue they should have been (A1360, A1375). Under the legal standards applied by the PSC, the time required for these purposes would not be included in any disallowance (*see* p. 4 *supra*).

C. The PSC's Investigation of the Outage and Its Holding That There Was as Yet No Record Basis for a Finding of Imprudence

Immediately after the February 15, 2000 outage, the PSC staff began to investigate the outage (A55-A69, A213). On

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[5] It is estimated that Con Edison's operation of the Indian Point 2 plant saved customers more than $3 billion in electricity costs since it commenced service in 1974 (A124-A125, A223).

March 30, 2000, the PSC commenced a formal proceeding to investigate the prudence of the outage (A71-A76). The PSC emphasized that the standard of prudence to be applied in the proceeding would be the standard that it had previously applied in such cases, namely, "how reasonable people would have performed the tasks that confronted the company" (A75).

Westchester County petitioned the PSC to suspend the operation of Con Edison's FAC, arguing that Con Edison was imprudent because it was the only utility that had not replaced its Westinghouse Model 44 steam generators (A347-A353) – exactly the argument accepted by the Legislature in the Indian Point Law. The PSC rejected the Westchester County petition (A167-A173). The PSC held that "there is, as yet, no record basis on which one could conclude that there is a substantial likelihood that Con Edison acted imprudently" (A172). The PSC emphasized that Westchester County's argument failed to take account of the established legal standard of imprudence:

> "The unanswered allegations in the Westchester Petition do not address the circumstances existing at the time the decisions were made, nor do they measure those decisions against the 'reasonableness' standard." (*Id.*)[6]

D. The Assembly's Condemnation of Con Edison and Its Passage of the Indian Point Law

On March 3, 2000, three committees of the New York State Assembly held a joint hearing, which was chaired by petitioner Brodsky (A783-A979). Although the Brodsky petition implies that this hearing gave the Legislature a factual basis for the

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[6] Petitioners incorrectly state that the PSC proceeding has been informally stayed during the pendency of this case (Pataki Pet. 5 n.2). In fact, the parties are involved in extensive discovery proceedings, and the filing of testimony is scheduled for February 14, 2003.

Indian Point Law (Brodsky Pet. 3-4), the notice of the hearing did not include any issue relating to imprudence (*see* A215-A217), and at the hearing petitioner Brodsky referred to the subject of imprudence only as an "assumption" that he had "no reason" to think was true:

> "Assume for a second – and I'm putting it out as an assumption – I have no reason to think it's true – but assume that Con Ed itself would have acted negligently in some way with respect to the cause or control of the incident, would that change your legal ability to collect from ratepayers the fuel adjustment charge?" (A919-A920.)

Although petitioner Brodsky had no reason to think Con Edison was imprudent on March 3, 2000, he had changed his mind by March 20, 2000, when he co-sponsored a bill, together with 56 other Assembly members, which declared that "the Consolidated Edison Company failed to exercise reasonable care on behalf of the health, safety and economic interests of its customers" (A77). The accompanying sponsors' memorandum explained that this finding of imprudence was based on Con Edison's failure to replace its Model 44 steam generators when other nuclear plant operators had replaced theirs (A79) – the exact same rationale which the PSC rejected as incompatible with the established legal standard of imprudence (*see* p. 8 *supra*).

On March 27, 2000, only one week after the bill was introduced, it passed the New York State Assembly by a lopsided vote of 137 to 10 (A1045). Assembly members voting for the bill condemned Con Edison's conduct (*e.g.*, "ConEdison has not kept the safety of the people in the surrounding areas and beyond upper most in their mind" (A89)); stressed safety issues that are within the exclusive jurisdiction of the NRC under the Atomic Energy Act (*e.g.*, "the implications when a plant is not

running safely has great implications for the rest of the State" (A88)); and expressed a lack of confidence in the PSC and the NRC (*e.g.*, "And I would just like to say that the systems that we have in place, be they the PSC, the NRC, ConEdison, they really have not been working for us" (*id.*)).

E. The PSC's Warning That There Was No Factual Basis for the Indian Point Law and That It Was Probably Unconstitutional

At this point, the PSC issued an extraordinary and unprecedented warning to the Legislature about the bill which had already passed the Assembly.

In a letter to members of the Legislature (A81-A82), the PSC stated that there was no factual basis for the bill's finding of imprudence on the part of Con Edison:

> "A. 10096, a bill introduced by Speaker Silver and passed by the Assembly, would prohibit Consolidated Edison from recovering any costs of replacement power. This prohibition is based on a proposed legislative finding that failure to replace IP 2 generators caused increased risk of radioactive leakage or plant outages. Until the investigations and proceedings are completed, there is no basis for such a finding. We, therefore, request that the Assembly recall the bill from the Senate and reconsider its passage pending the Commission's prudence investigation." (A81.)

The PSC further explained that the bill was not needed to fulfill its stated purpose, because the PSC already had the power to disallow imprudent fuel adjustment expenses (A81). Finally, the PSC issued a thinly veiled warning that the bill was probably unconstitutional because of the manner in which it targeted a single incident involving Con Edison (A82).

F. The Senate's Passage of the Indian Point Law and the Senate Sponsor's Avowal of His Intent to Punish Con Edison

The PSC's warning did not deter the New York State Senate from approving the bill by a margin even more lopsided than the Assembly's. On May 24, 2000, the Senate voted 57 to 1 in favor of the bill (A1045-A1046).

Members of the Senate who voted for the bill roundly condemned Con Edison's conduct (*e.g.*, "they choose to do it any way they want" (A96)), and declared that Con Edison should be punished (*e.g.*, "they should certainly be penalized for taking our health and toying with it" (A109)).[7] Especially telling were the statements of the Senate sponsor of the bill, Senator Velella. Senator Velella declared that "Con Edison has done a terrible thing here" and that "they put lives at risk" (A103). What is more, he proclaimed that "Velella's Law is going to stop them and punish them" (A104). It would be hard to imagine a more forthright or emphatic declaration of condemnation and punitive intent.

Governor Pataki approved the bill on August 8, 2000 (A414-A415). In approving the bill, the Governor made clear that he would not normally approve "legislation that usurps the PSC's authority in this area," but he said that he would do so in this "exceptional case" (A415).

On August 9, 2000, the day after the Governor's approval of the Indian Point Law, the PSC issued an order implementing the law (A116-A122). The PSC held that, because the law mandated the disallowance of *all* Indian Point replacement power charges, it could not reduce the disallowance to take

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[7] In fact, both the state and the NRC investigations concluded that there was no offsite release of radioactivity and no risk to the public health (Pataki Pet. 3a).

account of refueling or repair outages (A120), as it normally does (*see* p. 4 *supra*). This alone more than doubled the magnitude of the deprivation (*see* p. 7 *supra*).

G. The Critical Differences Between the Indian Point Law and the Substantive and Procedural Standards of Imprudence Applied in All Other Cases

There are crucial differences between the Indian Point Law and the substantive and procedural standards applied by the PSC in other cases.

Among the substantive differences between the Indian Point Law and the legal standards applicable in all other cases are the following:

- The legal standard of prudence applied by the PSC is a standard of reasonableness based upon the circumstances as they existed at the time the utility acted (*see* pp. 3, 4 *supra*). The Indian Point Law did not apply this standard, but instead was based upon *post hoc* reasoning of a kind which the PSC held did not even establish a substantial likelihood of imprudence in this case (*see* pp. 8, 9 *supra*).

- The PSC has held that no disallowance will be made for outages that would have been necessary in any event for refueling, maintenance, and installation of new equipment (*see* p. 4 *supra*). The Indian Point Law mandated the inclusion of such outages in the disallowance (*see* pp. 11-12 *supra*). As noted above, this alone more than doubled the magnitude of the deprivation (*see* pp. 7, 12 *supra*).

The procedural differences between the Indian Point Law and the legal standards governing the PSC in other cases are equally striking. Among the procedural rights which were denied here are the following:

- The right to notice of the asserted grounds for a finding of

imprudence (*see* pp. 3, 9 *supra*);

- The right to an evidentiary hearing at which the utility is able to present and cross-examine evidence on all issues of imprudence (*see* pp. 3, 9 *supra*); and
- The right to a reasoned decision by the PSC and to judicial review of any disallowance pursuant to Article 78 of the CPLR (*see* pp. 3, 11-12 *supra*).

REASONS FOR DENYING THE WRIT

I. This Case Presents No Issue Calling for Review by This Court

A. There Is No Conflict Among Courts Concerning the Applicability of the Bill of Attainder Clause to Corporations

Petitioners argue that this Court should grant certiorari to settle the issue of the applicability of the Bill of Attainder Clause to corporations (Pataki Pet. 8-17; Brodsky Pet. 19-29). But there is no conflict on this issue for this Court to resolve.

Every court that has considered the issue has held or assumed that the Bill of Attainder Clause applies to corporations – an assumption which has typically been shared by all of the parties before them, despite the fact that they disagreed sharply on the other issues raised.[8] No court has ever suggested that the Bill

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[8] *See, e.g., Club Misty, Inc. v. Laski*, 208 F.3d 615, 617 (7th Cir.) (assuming, without deciding, that corporations as well as individuals are protected by the Bill of Attainder Clause), *cert. denied*, 531 U.S. 1011 (2000); *Navegar, Inc. v. United States*, 192 F.3d 1050, 1065 (D.C. Cir. 1999) (stating that a bill of attainder is a law that "specifically singles out individuals (or businesses) and imposes punishment on them"), *cert. denied*, 531 U.S. 816 (2000); *BellSouth Corp. v. FCC*, 162 F.3d 678, 684 (D.C. Cir. 1998) (parties assumed "that the Bill of Attainder Clause protects corporations as well as individuals"); *SBC Communications, Inc. v. FCC*, 154 F.3d

of Attainder Clause does not apply to corporations.

In light of this broad consensus on the issue, there is simply no conflict calling for resolution by this Court.[9] It will be time enough for this Court to intervene if any court should ever hold that the Bill of Attainder Clause does not apply to corporations.

As the court of appeals noted (Pataki Pet. 12a), this Court has twice indicated that the Bill of Attainder Clause protects corporations and other entities as well as individuals. *See Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 n.9 (1995) ("Even laws that impose a duty or liability upon a single individual or firm are not on that account invalid – or else we would not have the extensive jurisprudence that we do concerning the Bill of Attainder Clause . . . ."); *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966) (Bill of Attainder Clause protects "individual persons and private groups, those who are peculiarly vulnerable to nonjudicial determinations of guilt").

As this Court explained in *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 779 n.14 (1978), the only constitutional provisions that do not extend to corporations are those "'purely personal' guarantees" whose "'historic function' has been limited to the protection of individuals," such as the privilege against self-incrimination. The Bill of Attainder Clause is not

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226, 234 & n.11 (5th Cir. 1998) (assuming "that the Bill of Attainder Clause applies to corporations" and citing six similar constitutional provisions which have been applied to corporations), *cert. denied*, 525 U.S. 1113 (1999); *BellSouth Corp. v. FCC*, 144 F.3d 58, 63 (D.C. Cir. 1998) ("We assume, as do the parties, that the Bill of Attainder Clause protects corporations as well as individuals"), *cert. denied*, 526 U.S. 1086 (1999).

[9] The strength of the consensus that exists on this issue is indicated by the fact that the petitioners' argument that the Bill of Attainder Clause does not apply to corporations represents an afterthought on their part. None of the petitioners made this argument in the district court (*see* Pataki Pet. 43a n.4), and petitioner Brodsky was the only petitioner who advanced the argument in the court of appeals (*see* Pataki Pet. 8-9 n.4).

such a "purely personal guarantee."

"To prohibit legislative Acts 'contrary to the first principles of the social compact and to every principle of sound legislation,' the Framers included provisions they considered to be 'perhaps greater securities to liberty and republicanism than any [the Constitution] contains.'" *Carmell v. Texas*, 529 U.S. 513, 521 (2000) (quoting The Federalist No. 44, at 282 (C. Rossiter ed. 1961) (J. Madison) and *id.* No. 84, at 511 (A. Hamilton)). These provisions, all embodied in Article I, § 10 of the Constitution, are the Bill of Attainder Clause, the *Ex Post Facto* Clause, and the Contract Clause. *Carmell v. Texas*, *supra*, 529 U.S. at 521; *see also, e.g., Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 137-38 (1810). The Bill of Attainder Clause, like "its textual and conceptual neighbor" the *Ex Post Facto* Clause, "aims to ensure that legislatures do not meddle with the judiciary's task of adjudicating guilt and innocence in individual cases." *Carmell v. Texas*, *supra*, 529 U.S. at 566 (Ginsburg, *J.*, dissenting); *see also, e.g., Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 323-25 (1866).

Thus the Bill of Attainder Clause, like the *Ex Post Facto* Clause and the Contract Clause, is a limitation on legislative power, not a purely personal right. For this reason, this Court has repeatedly entertained claims by corporations under the *Ex Post Facto* Clause[10] and under the Contract Clause.[11] By the same token, corporations are entitled to invoke the protections of the Bill of Attainder Clause.

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[10] *See, e.g., Chicago & Alton R.R. v. Tranbarger*, 238 U.S. 67, 73-74 (1915); *Kentucky Union Co. v. Kentucky*, 219 U.S. 140, 152-53 (1911); *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 107-08 (1909).

[11] *See, e.g., General Motors Corp. v. Romein*, 503 U.S. 181, 186-91 (1992); *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 410-19 (1983); *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 250-51 (1978).

That the Bill of Attainder Clause is not merely a personal right is also clear from the text of the Constitution itself. The Constitution does not say merely that individuals have a right not to be victimized by bills of attainder. Instead, it says, categorically and without exception, that "[n]o State shall . . . pass *any* Bill of Attainder . . . ." U.S. Const., Art. I, § 10 (emphasis supplied). It follows that any victim of a bill of attainder – whether a natural or a juridical person – may invoke the constitutional prohibition.

The teaching of history is to the same effect. Historically, bills of attainder have been directed not only against individuals, but also against groups and against corporate entities such as boroughs.[12] And this Court has struck down bills of attainder directed against groups, as well as against named individuals. *See, e.g., United States v. Brown*, 381 U.S. 437, 461 (1965) (striking down bill of attainder directed against the Communist Party); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 323-35 (1866) (striking down bill of attainder directed against ex-Confederates).[13] There is no reason why the constitutional protection against being singled out for punishment without the safeguards of a judicial trial should not apply to all.

For all these reasons, there is no need for this Court to take up the issue of the applicability of the Bill of Attainder Clause

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[12] *See, e.g., Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 323 (1866); *see also, e.g.*, 1 & 2 Geo. 4, c. 47 (1821) (stripping a borough of its seats in Parliament on a finding of bribery and corruption); 22 Geo. 3, c. 31, § 1 (1781) (changing the qualifications for voting in a borough on a finding of bribery and corruption); 11 Geo. 3, c. 55, § 2 (1771) (same).

[13] Petitioners argue that the Bill of Attainder Clause was intended to protect "disfavored" persons (Pataki Pet. 16; Brodsky Pet. 21-23). As the district court observed (with considerable understatement), Con Edison, "although not the prototypical powerless victim of constitutional overreaching by any stretch of the imagination, is clearly politically unpopular" (Pataki Pet. 49a).

to corporations – an issue on which there is no conflict among courts, and on which not a single judge of any court has espoused petitioners' position.

B. The Court of Appeals Correctly Applied the Standards Articulated by This Court Under the Bill of Attainder Clause, and Petitioners' Argument to the Contrary Disregards the Facts Found Below

Petitioners argue that review by this Court is necessary because the court of appeals supposedly departed from the standards articulated by this Court under the Bill of Attainder Clause, and allegedly created a new test focusing on "less burdensome alternatives" (Pataki Pet. 17-25; Brodsky Pet. 8-15).

Nothing could be further from the truth. Petitioners' argument is based on a palpable misreading of the decision of the court of appeals. Far from creating a new legal standard, the court of appeals correctly applied the Bill of Attainder Clause standards set forth by this Court in *Selective Service System v. Minnesota Public Interest Research Group*, 468 U.S. 841 (1984), and *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), to the facts it found based on the uncontradicted record in this case.

The three essential elements of a bill of attainder, as defined by this Court, are "specification of the affected persons, punishment, and lack of a judicial trial." *Selective Service System v. Minnesota Public Interest Research Group, supra*, 468 U.S. at 847.

Petitioners do not dispute (*see* Pataki Pet. 7; Brodsky Pet. 6) that the first and third elements of a bill of attainder – "specification of the affected persons" and "lack of a judicial trial" – are present in this case, as both courts below found (Pataki Pet.

10a, 16a-17a, 46a). The sole element disputed by petitioners is whether the Indian Point Law imposed "punishment," as both courts below also found (Pataki Pet. 17a-28a, 47a-54a).

This Court has formulated a tripartite inquiry for use in assessing whether a statute imposes punishment within the meaning of the Bill of Attainder Clause:

> "(1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute, 'viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes'; and (3) whether the legislative record 'evinces a congressional intent to punish.'" *Selective Service System v. Minnesota Public Interest Research Group, supra*, 468 U.S. at 852 (quoting *Nixon v. Administrator of General Services, supra*, 433 U.S. at 473, 475-76, 478).

These factors are to be weighed together in determining whether a statute imposes punishment, and it is not essential that all three factors be satisfied. *See Nixon v. Administrator of General Services, supra*, 433 U.S. at 475-76.

The court of appeals carefully weighed each of the three factors identified by this Court (Pataki Pet. 19a-28a). Petitioners assert that the court found that the first and third factors were not satisfied (Pataki Pet. 18; Brodsky Pet. 7, 12), but this is not so. Rather, the court held that it did not need to decide whether the historical test was met because the functional test was clearly satisfied (Pataki Pet. 20a). And, while the court stated that it did not rely on the evidence of legislative intent alone, it found that some legislators (including the Senate sponsor of the law) "unquestionably intended to punish Con Ed," and that this reinforced its independent conclusion based on the functional test (Pataki Pet. 28a).

Addressing the functional test, the court of appeals stressed – as had the district court (Pataki Pet. 53a) – that the record showed that a "quite substantial proportion" of the costs that the Legislature disallowed by the Indian Point Law would have been incurred even if the steam generators had been replaced earlier, and that their disallowance therefore could not be said to serve a compensatory function (Pataki Pet. 24a-27a).[14] Petitioners argue that the court of appeals thereby required "a *precise* fit" between the statute and its supposedly compensatory goals (Pataki Pet. 20; emphasis in original).

This argument is flatly contrary to the record facts. The record established that 60% of the total period of the outage – that is, $150 million of the total deprivation of $250 million mandated by the law – was accounted for by a pre-planned refueling and maintenance outage and by the installation of the new steam generators, both of which would have taken place even if the steam generators had been installed earlier (A1360, A1375). *The petitioners did not contest this crucial fact*; indeed, they waived an evidentiary hearing in the district court (Pataki Pet. 6). Thus, far from requiring a "*precise* fit" between the law and the quantum of compensatory damages, the court below simply made the obvious finding, based on the uncontradicted record, that a deprivation that exceeded compensatory damages by roughly $150 million imposed punishment (Pataki Pet. 25a-26a).

In so finding, the court of appeals followed the teaching of this Court in *Nixon v. Administrator of General Services*, *supra*, 433 U.S. at 482, that "[i]n determining whether a legislature sought to inflict punishment on an individual, it is often useful to inquire into the existence of less burdensome alternatives."

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[14] These are precisely the costs that would not have been disallowed by the PSC even if it had made a finding of imprudence (*see* p. 4 *supra*), but whose disallowance was mandated by the Legislature (*see* pp. 11-12 *supra*).

While the petitioners try to argue that this statement applied only to the purpose test (Pataki Pet. 22-23; Brodsky Pet. 13), this Court made clear in *Nixon* that the same principle applies to the functional test. *See Nixon, supra*, 433 U.S. at 475-76 (in applying the functional test, the law under challenge must be "viewed in terms of the type *and severity* of burdens imposed" (emphasis supplied)). Thus the court of appeals did not create a new "less burdensome alternatives" test, but simply applied the teaching of this Court that a law that imposes a deprivation of property going far beyond compensation must be viewed as imposing punishment.

Thus petitioners' argument that the court of appeals applied a new "less burdensome alternatives" test is founded on a misreading of the decision below and of this Court's decision in *Nixon*, and is contrary to the uncontradicted facts established by the record in this case.[15]

C. The Decision Below Will Not Result in the Ruinous Consequences Predicted by Petitioners, Because the Indian Point Law Is – for Good Reason – Literally Unique in the Annals of American Jurisprudence

Petitioners vie with each other to predict disastrous consequences if the decision below is not reversed, saying, for example, that it will "expose numerous laws regulating businesses to constitutional challenge" (Pataki Pet. 12), and that it will "endanger economic regulatory decisions made by legisla-

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[15] Petitioners try to manufacture a conflict between the holding of the court below and the statement of the District of Columbia Circuit in *BellSouth Corp. v. FCC*, 162 F.3d 678, 689 (D.C. Cir. 1998), that "it does not matter that Congress arguably could have enacted different legislation" (Pataki Pet. 24; Brodsky Pet. 9, 10), but there is no such conflict, because the *BellSouth* court was not confronted with a statute that imposed a deprivation of property that was concededly far in excess of compensatory damages.

tive bodies across the nation" (Brodsky Pet. 14). There is no basis for these hyperbolic claims.

The fact is that the Indian Point Law is literally unique in the annals of American jurisprudence. Petitioners have cited – and we have found – no other case since the ratification of the Constitution in which a legislative body has (1) tried and determined the issue whether a specific person was at fault in connection with a specific past occurrence, (2) imposed a deprivation far exceeding the amount of compensation, and, to make matters worse, (3) retrospectively applied different substantive standards than those applicable to all other persons and occurrences.[16] Only a law that does all of these things – or at least the first two of them – has anything to fear from the decision below. The court of appeals rightly stressed "the extraordinary scarcity of legislation of [this] type" which is not only "so exceptionally narrow in scope," but also "manifestly retrospective in focus, and unavoidably punitive in operation" (Pataki Pet. 29a).

In particular, contrary to petitioners' argument (Pataki Pet. 25-26; Brodsky Pet. 16-18), the decision below does not threaten the legislative power to set utility rates which this Court reaffirmed in *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 313 (1989). As the court of appeals correctly emphasized (Pataki Pet. 17a), the Indian Point Law was not a prospective measure setting utility rates for the future, but rather was a retrospective adjudication of Con Edison's supposed imprudence in the context of the electric rates which had already been set by the PSC for Con Edison back in 1997 (*see* pp. 2-3, 4-5

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[16] Before the adoption of the Constitution, as this Court explained in *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219-22 (1995), such instances of legislative overreaching were not uncommon, but it was one of the fundamental goals of the Framers of the Constitution to end such abuses. *See id.* at 222-25; *see also, e.g., Carmell v. Texas*, 529 U.S. 513, 521 (2000).

supra).[17] When these facts are combined with the punitive nature of the deprivation imposed by the law, it becomes obvious that the decision below poses no threat to any legislature that wishes to return to the 19th-century practice of setting utility rates itself. The decision below simply reminds us that, whatever power it purports to exercise, the Bill of Attainder Clause requires a legislature to avoid punitive deprivations based on retrospective adjudications of guilt in individual cases.

II. The Issues Raised by Petitioners Are Not Determinative of This Case, Because the Indian Point Law Is Invalid for Additional Reasons Which Were Not Reached by the Court Below

In addition to the Bill of Attainder Clause, which was the ground on which both courts below invalidated the Indian Point Law, Con Edison also contended below that the law is invalid as (a) a denial of equal protection, (b) a denial of procedural due process, (c) an attempt to regulate nuclear health and safety that is preempted by the Atomic Energy Act, and (d) a violation of the Contract Clause (A22-A27). Although the court of appeals found it unnecessary to reach these additional grounds, their presence makes it even more clear that the issues sought to be raised by petitioners are not determinative of the result in this case.[18]

A. Equal Protection

In addition to finding that the Indian Point Law violated the

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[17] It was conceded below that the Legislature's action here was an adjudication (A1379).

[18] It is well established that a respondent in this Court may "defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals." *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979).

Bill of Attainder Clause, the district court also found that it violated the Equal Protection Clause (Pataki Pet. 35a-42a). The Court of Appeals did not reach this question, although it expressed doubt that the law denied equal protection (Pataki Pet. 8a-9a n.2).

The Indian Point Law singles out a single utility – Con Edison – and a single past incident – the February 2000 outage at Indian Point. This alone does not necessarily mean that the law denies equal protection, because "[e]ven laws that impose a duty or liability upon a single individual or firm are not on that account invalid . . . ." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 n.9 (1995). However, a law that defines a "class of one" is not automatically valid either. The question here, as in most equal protection cases, is whether there is a rational basis for having one set of substantive and procedural rules applicable only to Con Edison, and a different set applicable to all other utilities in the state. *See, e.g., Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000).

The law created two classes of utilities. One class (all other utilities) has substantive and procedural rights with respect to the issue of imprudence (*see* pp. 12-13 *supra*). The other class (Con Edison) has none of these rights (*see id.*).[19] The petitioners argued below that the use of different rules for Con Edison was rational because it was the only utility in the state that still used Westinghouse Model 44 steam generators (Pataki Pet. 39a-40a). But, as the district court pointed out (*id.*), there is no reason why the legal standards governing imprudence should be changed for a single outage merely because the outage involved one type of equipment rather than another.

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[19] The critical importance of these differences is demonstrated by the fact that the very factors which the PSC had held were insufficient to give rise to a substantial likelihood of imprudence formed the basis for the Legislature's finding of imprudence (*see* pp. 8, 9 *supra*).

This case exemplifies the wisdom of Justice Jackson's now-classic observation in his concurring opinion in *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 113 (1949), that "[c]ourts can take no better measure to assure that laws will be just than to require that laws be equal in operation." *See also, e.g., McFarland v. American Sugar Refining Co.*, 241 U.S. 79, 86-87 (1916) (Holmes, *J.*) (if the legislature were to declare a single company presumptively guilty of monopolization, "we suppose that no one would contend that the [company] was given the equal protection of the laws").

B. Procedural Due Process

Procedural due process analysis proceeds in two steps: "we inquire whether the State has deprived the claimant of a protected property interest, and whether the State's procedures comport with due process." *Lujan v. G & G Fire Sprinklers, Inc.*, 532 U.S. 189, 195 (2001) (citation omitted).

As the court of appeals found (Pataki Pet. 20a), the Indian Point Law clearly deprived Con Edison of a property interest, because the FAC in Con Edison's tariff approved by the PSC in 1997 entitled Con Edison to recover a specified portion of the increased energy costs caused by an outage, unless the PSC made a finding of imprudence after a hearing (*see* pp. 2-5 *supra*). "A state-created entitlement that cannot properly be eliminated except for cause is a property right of which the holder may not be deprived without procedural due process." *RR Village Ass'n, Inc. v. Denver Sewer Corp.*, 826 F.2d 1197, 1201 (2d Cir. 1987) (citing, *inter alia*, *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538-39 (1985)). Indeed, a utility's due process right to a hearing on the issue of imprudence has been expressly recognized by the New York State Attorney General (*see* pp. 3-4 *supra*).

In *United States v. Florida East Coast Ry.*, 410 U.S. 224, 245

(1973), this Court, after reviewing its prior decisions, formulated the following general standard differentiating the policy-type proceedings in which no hearing is required by due process from the quasi-adjudicatory proceedings in which a hearing is required:

> "[T]hese decisions represent a recognized distinction in administrative law between proceedings for the purpose of promulgating policy-type rules or standards, on the one hand, and proceedings designed to adjudicate disputed facts in particular cases on the other."

The issue of imprudence raised in this case is quintessentially a quasi-adjudicatory issue on which a hearing is required, because it is a "proceeding[] designed to adjudicate disputed facts in [a] particular case[]." As the PSC admitted below, "[t]his was an adjudicatory act" (A1379). New York law explicitly recognizes the utility's right to an evidentiary hearing on this issue (*see* pp. 3-4 *supra*).

The procedures followed by the State Legislature in enacting the Indian Point Law clearly did not comport with due process, as both courts below found (Pataki Pet. 10a, 46a). The law thus violated Con Edison's due process rights.

C. Atomic Energy Act Preemption

As the court of appeals noted (Pataki Pet. 23a-24a), "the Federal Government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the States." *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 212 (1983). Therefore, state regulation of nuclear power plant safety is preempted if *either* the purpose *or* the effect of the state regulation is to regulate nuclear power plant safety. *See, e.g., English v. General Elec. Co.*, 496 U.S. 72, 84 (1990). The

Indian Point Law is preempted under both of these tests.

First, the Indian Point Law proclaimed on its face its purpose to regulate nuclear power plant safety, saying, for example, that "[r]ate regulation of nuclear operators should discourage the taking of risks with regard to *potential threats to public health and safety*" (Pataki Pet. 2; emphasis supplied). Both the Assembly and the Senate debates contained repeated accusations that Con Edison had endangered the public health and safety, despite the undisputed fact that the February 2000 leak did not result in any such danger (*see* pp. 6-7 *supra*). *See, e.g.*, A89 ("ConEdison has not kept the safety of the people in the surrounding areas and beyond upper most in their mind"); A109 ("they should certainly be penalized for taking our health and toying with it"). Thus the Indian Point Law clearly had the forbidden purpose to regulate nuclear power plant safety.[20]

Second, any state statute that "seek[s] to regulate the construction or operation of a nuclear powerplant" is preempted because, "even if enacted out of non-safety concerns, [it] would nevertheless directly conflict with the NRC's exclusive authority over plant construction and operation." *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, supra*, 461 U.S. at 212. In the present case, the Indian Point Law effectively mandated the replacement of the existing steam generators, whether or not their use was consistent with the NRC's regulations and directives, by the simple but effective device of disallowing all replacement power costs "until the conclusion of such outage, *or incurred at any time until all defective steam generation equipment at the facility has*

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[20] The petitioners argued below that the law would be valid if it had an economic purpose as well as a safety purpose, but comparable questions have been addressed by this Court under other federal statutory schemes, and have been answered in the negative. *See, e.g., Gade v. National Solid Wastes Mgt. Ass'n*, 505 U.S. 88, 104-08 (1992); *Perez v. Campbell*, 402 U.S. 637, 651-52 (1971).

been replaced, whichever occurs later" (Pataki Pet. 2; emphasis supplied). Thus the Indian Point Law is preempted for this reason as well.

D. Contract Clause

The Contract Clause of the Constitution – which, like the Bill of Attainder Clause, is found in Article I, § 10 (*see* p. 15 *supra*) – provides that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ."

Whether a state law violates the Contract Clause is determined by a three-step analysis, which asks in turn: (1) whether the law is a substantial impairment of a contract; (2) whether it serves a significant and legitimate public purpose, such as remedying a general social or economic problem; and, if such a public purpose is established, (3) whether the means chosen to accomplish the purpose are reasonable and appropriate. *See, e.g., Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411-13 (1983); *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 242-44 (1978).

The substantial impairment inquiry has three subparts: (1) whether there is a contract; (2) whether the law impairs the contract; and (3) whether the impairment is substantial. *See, e.g., General Motors Corp. v. Romein*, 503 U.S. 181, 186 (1992). The agreement approved by the PSC in 1997, which fixed the rates for Con Edison during the relevant period after reflecting rate reductions of more than $1.1 billion (*see* pp. 4-5 *supra*), plainly fits within the definition of a contract as "a bargained-for exchange between the parties," *Rowe v. Great Atlantic & Pacific Tea Co.*, 46 N.Y.2d 62, 67, 385 N.E.2d 566, 569, 412 N.Y.S.2d 827, 830 (1978), because it was the product of lengthy negotiations in which Con Edison made very significant concessions in return for, among other things, an FAC to protect against the vicissitudes of the newly volatile energy

market (*see* pp. 4-5 *supra*).[21] Clearly, the Indian Point Law substantially impaired Con Edison's rights under the agreement, because it swept away $250 million in replacement power costs to which Con Edison was entitled under the agreement.

If a substantial impairment of contract is to be upheld despite the Contract Clause, there must be "a significant and legitimate public purpose behind the regulation, such as the remedying of a broad and general social or economic problem." *Energy Reserves Group, Inc. v. Kansas Power & Light Co., supra*, 459 U.S. at 411-12 (citation omitted). In applying this requirement, this Court has distinguished between generally applicable legislation and legislation singling out a narrow category of persons for distinct treatment. *See, e.g., Allied Structural Steel Co. v. Spannaus, supra*, 438 U.S. at 248-49. The Indian Point Law bears no resemblance to the statutes that have been held to serve a broad societal interest. On the contrary, it is narrowly focused upon a single occurrence and a single utility. As the PSC told the Legislature, it "prohibits Con Edison, *but no other utility*, from recovering power replacement costs – *even if they are found prudent*" (A82; emphasis supplied). Therefore, the law does not serve a substantial public purpose within the meaning of the Contract Clause.

Even if legislation has a significant public purpose – which was not the case here – courts must still determine whether the means chosen to achieve the goal were reasonable in light of, among other things, less drastic alternatives. *See, e.g., United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 31 (1977). Here, the Legislature clearly had a less drastic alterna-

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[21] A long line of federal cases has held that settlement agreements between utilities and their regulatory commissions are binding contracts. *See, e.g., Texas Eastern Transmission Corp. v. FPC*, 306 F.2d 345, 347 (5th Cir. 1962), *cert. denied*, 375 U.S. 941 (1963). The PSC argued below that this is not true of settlement agreements approved by it, but no New York case so holds.

tive: to rely upon the PSC to perform its historic role of adjudicating a claim of imprudence. Since a generally applicable means for protecting the public interest without impairing contract rights was available, the Indian Point Law was unnecessary to advance a legitimate public purpose, and therefore violated the Contract Clause.

CONCLUSION

For the reasons set forth above, the petitions for a writ of certiorari should be denied.

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